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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1972

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No. 72-1188

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ELLIOT L. RICHARDSON, SECRETARY OF DEFENSE, ET AL.,
*Petitioners*

v.

RESERVISTS COMMITTEE TO STOP THE WAR, ET AL.,
*Respondents*

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**Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit**

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## BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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### ARGUMENT

The decision of the District Court, affirmed *per curiam* by a unanimous Court of Appeals, is clearly correct. The decision below does not warrant review by this Court.

1. *Standing.* The decision below was a careful and conscientious application of the principles governing standing to sue announced by this Court in *Flast* v.

*Cohen,* 392 U.S. 83, as reaffirmed in *Sierra Club* v. *Morton,* 405 U.S. 727. As the District Court recognized, the doctrine of standing is rooted in Article III of the Constitution and is an expression of the requirement that there be an actual case or controversy. App. A (to the Petition for Certiorari), 27-28. The District Court applied to the case before it the *Flast* requirements that "the dispute sought be adjudicated will be presented in an adversary context" and that the complainants have "a personal stake in the outcome of the controversy," *ibid.; Sierra Club* v. *Morton,* 405 U.S. 727, 732. The issue in the case, like in *Flast* v. *Cohen,* was the violation of a specific provision of the Constitution. The case did not present the question of a violation of a statute, and in this respect differs from *Sierra Club* v. *Morton, Association of Data Processing Service Organization* v. *Camp,* 397 U.S. 150, and *Barlow* v. *Collins,* 397 U.S. 159. The requisite "personal stake" therefore had to be defined in the constitutional terms stated in *Flast,* 392 U.S. at 102—in the "logical nexus between the status asserted" by the plaintiffs, as citizens, "and the claim sought to be adjudicated." App. A, 30-31. In other words, there had to be a relationship between the plaintiffs' status and the constitutional provision invoked.

The District Court found the requisite nexus in the relationship between plaintiffs' status as citizens of the United States and the Incompatibility clause of the Constitution, Art. I, § 6, cl. 2, whose thrust is to preserve the separation of powers principle of our constitutional plan. It found injury to plaintiffs—and all other citizens—in "the potential for undue influence" created by violation of the clause, "a precise self-operative provision of the Constitution," which

presented a "narrow" issue, not "a generalized grievance about the conduct of government." App. A, 30-31. And the District Court found that there was no other status besides that of citizens that would confer standing; that "if these plaintiffs cannot obtain judicial review of defendants' action, then as a practical matter no one can." App. A, 31. The decision below thus carefully applied this Court's " 'rule of self-restraint' designed to avoid passing on premature or ill-focused constitutional claims." App. A, 28. See *Note,* 85 HARV. L. REV. 507, 510-512 (1971).

The decision not only correctly applied the principles of *Baker* v. *Carr,* 369 U.S. 186, and *Flast* v. *Cohen,* but remains consistent with later decisions of this Court. The injury to plaintiffs is shared equally by all citizens, but is it not thereby "less deserving of legal protection through the judicial process," and plaintiffs are themselves "among the injured," *Sierra Club* v. *Morton,* 405 U.S. at 735. Recognition of plaintiffs' standing was necessary if the Incompatibility clause was not to go unenforced, App. A, 31, a result that, contrary to this Court's view, would "insulate" unconstitutional "executive action from judicial review," *Sierra Club* v. *Morton,* 405 U.S. at 740; *cf. Linda R. S.* v. *Richard D. and Texas,* —— U.S. ——, slip Opinion at 6, n. 5. (March 5, 1972, No. 71-6078).[1]

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[1] The importance of this factor is emphasized by the extreme position petitioners have heretofore taken. While petitioners concede that the Incompatibility clause would bar a legislator from "hold[ing] a commission in the Regular Army," Petition at 14, they would deny any litigant standing to contest the violation in court. At oral argument in the Court of Appeals petitioners declared that the courts were powerless to act even if the Chairman of the Joint Chiefs of Staff were to win election to and take his seat in the Senate while refusing to relinquish his military office.

The decision below is likely to be applicable in no more than a handful of cases. Precise prohibitions of this sort, where no litigant with a status other than that as a citizen would be likely to invoke the clause, are few. There is little likelihood that it will "spawn a significant number of suits by citizens," Petition at 7. This case is probably *sui generis*.

The decision below, thus carefully limited to a narrow class of cases, is not in conflict with decisions in other circuits. Petition at 9. In the four opinions petitioners cite as in conflict there was, unlike in this case, no "violation of specific constitutional limitations," *Troutman* v. *Shriver*, 417 F.2d 171, 174 (5th Cir. 1969) *cert. denied* 397 U.S. 923, for the constitutional provisions invoked were broad grants of authority to the Congress (like the war making power in *Velvel* v. *Nixon*, 415 F.2d 235 (10th Cir. 1969), *cert. denied* 396 U.S. 1042 and *Pietsch* v. *President of the United States*, 434 F.2d 861 (2d Cir. 1970), *cert. denied* 403 U.S. 920) or to the States (like the 10th amendment in *Lamm* v. *Volpe*, 449 F.2d 1202 (10th Cir. 1971)). Also, unlike this case, there were other potential litigants who had standing to challenge the action complained of in *Lamm* (Congress had expressly created a remedy for states against any withholding of highway funds for, *inter alia*, failure to get rid of billboards—which Lamm asserted interfered with the States' police power) and to present the issue of the unconstitutionality of the draft alleged in *Pietsch*, (*e.g.*, draftees) the only issue as to which the court dealt with Pietsch's standing as a "citizen-at-large," 434 F.2d at 863.[2]

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[2] But *cf. Velvel*, 415 F.2d at 238 n. 1, citing cases that all antedate *Flast*.

2. *Justiciability.* The District Court was correct in finding that the issue raised was justiciable. The petitioners had urged below, as they do here, that the case involves the qualifications of a member of Congress to be seated, which only the Congress itself may judge. Petition at 10-12. The District Court correctly pointed out that the issue is not whether Congressmen should be seated, but rather whether the petitioners—Cabinet Secretaries—may continue to maintain seated Congressmen in their previously held office as Reserve officers. While Congress may have sole authority "to judge whether its members are disqualified from being seated by virtue of their holding an office," Petition at 12 n. 9, it is the courts, not Congress, which have the duty to determine whether a Cabinet Secretary's action is in violation of the Constitution and the power to provide a remedy for such violation. See *Note,* 85 HARV. L. REV. *supra* at 508-510; *Note,* 40 UNIV. CINCINNATI L. REV. 621, 624-25 (1971).

3. *The Merits.* The District Court was likewise clearly correct in holding that the Incompatibility clause bars members of Congress from continuing to serve in the Armed Forces reserves. The District Court analyzed the constitutional debates with great care and concluded that "the clause was designed to ensure the integrity of a particular form of government, by preventing encroachments upon the separation of powers . . . ." App. A, 22. The District Court then turned to the specific question whether a reserve commission was an "office" within the meaning of the clause. *Id.* at 24. The District Court recognized the "limited nature" of a Reservist's "relationship [with] the Executive branch" but found this of little weight against "the purpose of the Framers, who erected an

inflexible barrier against Congressmen holding or being appointed to any other office under the United States," and "the enormous involvement of Congress in matters affecting the military." *Id.* at 26; see *id.* at 27.[3]

In short, a Reservist, however limited his activities, is by virtue of his Reserve membership alone subject to the constitutional prohibition because he is, by however so little, subject to influence the Incompatibility clause was intended to eradicate absolutely. "[N]o line can be drawn between the large and small office." App. A., 27. See *Note,* 85 HARV. L. REV. *supra* at 513.

## CONCLUSION

The Petition for Certiorari should be denied.

Respectfully submitted,

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[3] Petitioners, quoting a law review note, make factual assertions about the characteristics of a Reserve commission. Petition at 11. It should be noted that the record is silent on this matter because the District Court permitted no discovery and resolved the issue as a matter of law. Contrariwise, the record does contain a plethora of evidence from published Congressional debates, hearings and reports and from the Reserve Officers Association's magazine showing the influence of Congressmen-reservists' reserve connections upon their legislative activities. This material was reproduced as Appendix I and II to respondents' brief in the Court of Appeals.